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No. 87-674

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

THE MIHALEK CORPORATION AND LAWRENCE PATRICK MIHALEK, Petitioners

v

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, Director, ROSS ROY, INC., Respondents

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REPLY BRIEF FOR THE PETITIONERS RULE 22.5

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Are a State of the United States, its political subdivisions, their employees, officers and officials, when sued for money damages and injunctive relief for copyright infringement in violation of the Copyright Act of 1976, entitled to immunity under the Eleventh Amendment to the United States Constitution?

2. Are intellectual property rights considered a property under the Fifth Amendment taking clause of the United States Constitution?

3. What are the standards of the tests for copyright infringement, the taking of intellectual property under the Fifth Amendment and false designation of origin, section 43(a) of the Lanham Act (15 U.S.C. 1125(a)), involving a State of the United States, its political subdivisions, and their employees, officers and officials?

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copyrighted document, when wholesale access is admitted, establish a triable issue of fact for a jury to preclude the granting and affirming of a summary judgment in light of Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) and Baxter v. Williams, 812 F.2d 421 (9th Cir. 1987) cert. denied, ____ U.S. ____ (November 16, 1987)? 3

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REPLY BRIEF FOR THE PETITIONER

I.

SPECIAL AND IMPORTANT REASONS SUPREME COURT RULE 17

What is at stake in this Writ is not a dispute over facts unique to these parties as the Respondents contend, but as a matter of law, what is the law and how are the tests under the law applied to the facts in this case? How do the Fifth and Eleventh Amendments to the Constitution of the United States apply? This case has affected a 154 billion dollar industry and the rights of tens of thousands of copyright owners coast-to-coast, as evidenced by the participation of eleven amici curiae below in this cause (see Petitioners' Brief, p. 24).

A. THE RESPONDENTS' BRIEFS IN OPPOSITION HAVE RAISED ARGUMENTS, PURSUANT TO SUPREME COURT RULE 22.5, WHICH ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW, PURSUANT TO SUPREME COURT RULE 17.1(a)(c).

1. As a matter of law, does Congress have the power under Article 1, Section 8, Clause 8 by enacting the Copyright Act, 17 U.S.C., to abrogate a state's

sovereign immunity under the Eleventh Amendment to the Constitution of the United States? And did Congress exercise this power?

2. Was it the intent of this Court in Atascadero State Hospital, et al. v. Scanlon, 473 U.S. 234 (1985), to give states of the United States "A LICENSE TO STEAL INTELLECTUAL PROPERTY RIGHTS" under the color of the Eleventh Amendment, a reading of Atascadero which is being adopted in copyright cases by numerous courts below? (See Petitioners' Brief, pp. 21-22)

3. Does the language in the major opinions of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Atascadero State Hospital, et al. v. Scanlon, 473 U.S. 235 (1985); and Welch v. Texas Dept. of Highway and Public Transportation, et al., 483 U.S. ____, 55 USLW 5046 (June 25, 1987) render Hans v. Louisiana, 134 U.S. 1 (1890) moot, when the specific language in the Eleventh Amendment extends only to Federal Diversity Jurisdiction?

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5. As a matter of law, pursuant to Rule 56 FRCP, is the test to determine a triable issue of fact in a copyright infringement suit governed by a side-by-side comparison designed to show **dissimilarities** as advanced by Respondents and accepted by the Courts below or is the test based on showing similarities?

6. As a matter of law, pursuant to Rule 56 FRCP, does direct verbatim copying by Respondents of a validly copyrighted document, when wholesale access is admitted, establish a triable issue of fact for a jury to preclude the granting and affirming of a summary judgment in light of Anderson v. Liberty Lobby Inc., 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) and Baxter v.

Williams, 812 F.2d 421 (9th Cir. 1987) cert. denied, ____ U.S. ____ (November 16, 1987)?

7. As a matter of law, do numerous affidavits, submitted pursuant to Rule 56(e) FRCP, which demonstrate questions of substantial similarity in the minds of average lay observers in a copyright infringement suit raise an issue of fact to preclude the granting and affirming of a summary judgment in light of Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947), Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) and Baxter v. Williams, 812 F.2d 421 (9th Cir. 1987) cert. denied, ____ U.S. ____ (November 16, 1987)?

8. As a matter of law, pursuant to Rule 56 FRCP, can a Court of Appeals remand without reversing a summary judgment grant when a question of fact is present for further fact finding without first "REVERSING" the grant of summary judgment in light of First National Bank of Arizona v. Cities Service Co., 391

U.S. 253 (1968); Anderson v. Liberty Lobby Inc., 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) and Arenas v. U.S., 322 U.S. 419 (1944)?

9. As a matter of law, pursuant to Rule 54(b) FRCP, does a final judgment by the District Court involving only the Eleventh Amendment to the Constitution require the Court of Appeals to reach the Constitutional question?

B. AS A MATTER OF LAW, THE RESPONDENTS' BRIEFS IN OPPOSITION HAVE FAILED TO STATE REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT, PURSUANT TO SUPREME COURT RULE 22.1.

The total sum of all the arguments advanced by Respondents in their briefs of opposition are based on a wrongful factual side-by-side comparison that was arranged and conducted by the District Court and affirmed by the Court of Appeals. This side-by-side comparison was a **sham**, designed by Respondents with the District Court's approval to purposely show **dissimilarities** and adopted by the Courts below.

The proper test, as a matter of law, for determining a question of fact in a copyright infringement suit, pursuant to Rule 56 FRCP, is based on a side-by-side comparison showing **similarities** of expression, not dissimilarities. See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., supra, the leading case, and Baxter v. Williams, supra.

The **Respondents' dissimilarities test** was applied as follows. On February 11, 1985, the Respondents filed a motion for summary judgment involving Petitioners' copyright claims. (See Sixth Circuit Appendix, pages 172-186). The Respondents proffered Exhibits A and B in support of their motion. Exhibit A comprised certified copies of Petitioners' works, copyright registration numbers, TXu 139-832, TXu 139-833, PAu 557-097 and VAu 53-133. Exhibit A was supplied to Respondents by the Library of Congress.

Exhibit B was carefully selected by Respondents to confuse and show dissimilarities. The composition of Respondents' Exhibit B changed from time to time and

included, among other things, numerous irrelevant works which were developed in the 1960's and 1970's and video tapes involving other cities, states and countries. (See Sixth Circuit Appendix, pp. 1268-1334)

Rather than test the similarities of Respondents' infringing Say Yes to Michigan and Yes Michigan campaigns, as alleged in the verified complaint, the District Court ordered Petitioners to select a limited number of items only from Exhibit B already **preselected** by Respondents.

This incorrect method of attempting to ascertain whether or not substantial similarities exist between Petitioner's works and the Respondents' campaigns was vehemently opposed by Petitioner (see record of appeals number 85-1593/1986). Nevertheless, the end result was that the "DISTRICT COURT ORDERED" Petitioner to match "RESPONDENTS' EXHIBIT B" (see Order, dated March 26, 1985, pp. 49a and 50a of Petitioners' Petition), rather than to show substantial similarities between the

Petitioners' program and the Respondents' campaigns. This incorrect and incredible Order states in part:

> . . .Attorneys for plaintiffs shall have the responsibility of designating those items that compose Exhibit B to the motion, selected products of defendants' promotional campaign, that allegedly infringe particular copyrighted materials of plaintiffs. . .. (Emphasis added.)

There was no motion or hearing on the above described procedures utilized by the District Court and described in the above Order. In addition, the District Judge was on a two-month vacation at the time.

The Respondents continue to advance their Exhibit B and their **side-by-side dissimilarity comparison** in this Court in hopes of inducing this Court to affirm erroneous standards. An example is exhibited on page 8 of Respondents' State of Michigan Brief:

> . . .Examples of the State's history of advertising were shown to both the Court of Appeals and the District Court as part of the exhibits they examined.. . .

and on page 33

> . . .Mihalek's burden was to show substantial similarity of both ideas and expressions. Berkic, 761 F.2d at 1291. The District Court

> correctly identified this burden and conducted a side-by-side examination. Mihalek, 630 F. Supp. at 14. It determined which elements were protected by copyright and concluded that only similarity existed with things not copyrightable. Mihalek, 630 F. Supp. at 15, 16. The District Court then found no substantial similarity under both tests. Mihalek, 630 F. Supp. at 15. The Court of Appeals agreed. Mihalek, 814 F.2d at 294-5. . .. (Emphasis added.)

As a result, the District Court even ignored the Petitioner's documents directly copied by Respondents (supra) because these documents among many others showing substantial similarity, while entered into evidence by Petitioners, were not part of Exhibit B proferred by Respondents. (See District Court's Oral Opinion, Sixth Circuit Appendix pp. 534-591.)

This Court should also be aware that Respondents did not supply to the Court of Appeals the original Exhibits A and B as supplied to the District Court; instead they supplied copies entitled "Selected Samples"!

II

COUNTER-STATEMENT OF THE CASE

Respondents' statements of the case are based on

adhominem principles and on the recharacterization and mischaracterization of the facts in this case. A few examples are necessary for this Court to understand, not only as a matter of law but also as a matter of fact, that there is an injustice here.

Indeed, Respondents continue to raise incomplete issues of fact. For example, Respondents exhibit the affidavit of former Governor William G. Milliken, explaining Governor Milliken's lack of involvement with Petitioner Mihalek (see Respondents' Appendix 9b). However, Mihalek's affidavits (see Petitioners' Appendix 77a) exhibit a personal letter to Mihalek from Governor Milliken, instructing Mihalek to work with Milliken's people and states, ". . .It is important, therefore, that you keep them fully informed of your efforts. . .". Governor Milliken signed this letter in his own hand. A factual issue to say the least.

Respondents also exhibit the affidavit of John H. Porter (see Respondents' Appendix 11b) which is disputed by affidavit of Mihalek (see Petitioners' Appendix 59a).

In addition, from the Respondents' own certified records the same State Officials, two of whom are Norton Berman, Director, Michigan Department of Commerce, and Jack Wilson, Director, Michigan Travel Bureau, who had access to both Mihalek's property and John H. Porter, were caught with photocopies of Mihalek's 42-page unpublished copyrighted advertising proposal plan with proper notice of copyright, copyright registration number TXu 139-833, in their files. (See Sixth Circuit Appendix page 280-281.) These unauthorized copies were marked "THIS DOCUMENT PAID FOR WITH STATE FUNDS". No payment was ever made to Mihalek. Further, Mihalek's property was **transferred** and **transmitted** to John H. Porter and his company employees by State Official Jack Wilson (see Petitioners' Appendix 79a). This action enabled Porter, who had signed a **14-month** contract to develop an advertising program, to develop the program in just **13 days** culminating in the Say Yes to Michigan Campaign. (See Sixth Circuit Appendix pages 316-328.) The Court of Appeals states at Mihalek 814 F2d at 294-7

that no evidence or copying or wrongful appropriation was presented.

Access in this case was "GRAND CENTRAL STATION STYLE". Thirteen top State Officials worked with Mihalek over a period of 14 months on almost a daily basis. They also drove 80 miles to review Mihalek's property in the basement of Mihalek's home. Not once, not twice or even three times, but six times, up to just twelve days before Respondents launched their advertising campaign (see Petitioners' Appendix 59a-83a). These same State Officials worked with John H. Porter and his employees. Why would a herd of State Officials, over a 14-month period, want access, and the Governor of a State instruct Mihalek to keep everybody informed? Because Mihalek's advertising property had tremendous value and still is ingenious. They all liked Mihalek's property (see generally Sixth Circuit Appendix, pp. 939-1101), but they didn't think he could do it. So Respondents, in a nut shell, simply took it and used it, period! (See Sixth Circuit Appendix,

pp. 24-171, 757-938, 1102-1194).

The importance of Mihalek's property to Respondents is obvious, yet Respondents now, after they have derived the benefits from Mihalek's genius, describe Mihalek's advertising property as "crude and unimaginative". This outrageous statement by Respondents flies in the face of the facts in this case. (See Copyright Registration Numbers TXu 139-832, TXu 139-833, PAu 557-097 and VAu 53-133) and (see Petitioners' Appendix 70a, 71a.)

In any event, this case has never been fully adjudicated in accordance with the authorities of this Court, well-established intellectual property law, controlling statutes and Mihalek's exhibits, all of which have been ignored by the Courts below.

Instead, this case has been decided on adhominem conclusions that fly in the face of "certified" facts by the Courts below and by the hollow words of Respondents, their ability to influence via "credibility" and by erroneous side-by-side comparison, designed by

Respondents, to show dissimilarities. (See Respondents' Brief, pp. 7-8.)

III

CONFLICTS WITH LEGAL STANDARDS SUPREME COURT RULE 17.1(a), (c)

A. ELEVENTH AMENDMENT.

Lower court judgments in Mihalek are contrary to Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979); Goldstein v. California, 412 U.S. 546 (1973); Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

B. FIFTH AMENDMENT.

Lower court judgments in Mihalek are contrary to Perry v. Sindermann, 408 U.S. 593 (1972) and Internation News Service v. Associated Press, 148 U.S. 215 (1918).

C. RULE 56 FEDERAL RULES OF CIVIL PROCEDURE. DECISIONS IN MIHALEK ARE CONTRARY TO:

Lower court judgments in Mihalek are contrary to

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968); Simler v. Conner, 372 U.S. 221 (1963); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Kennedy v. Silas Mason Co., 334 U.S. 249 (1948); and Arenas v. U.S., 332 U.S. 419 (1944).

1. **COPYRIGHT TEST.**

Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947), "slightest doubt test"; Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977), "two-step test"; Baxter v. Williams, 812 F.2d 421 (9th Cir. 1987), cert. denied, ____ U.S. ____ (November 16, 1987), "no bright line rule".

a. **ACCESS.**

Sid & Marty Krofft, supra, "INVERSE RATIO RULE" (Sixth Circuit Appendix,

pp. 274-275, 278).

b. **COPYRIGHT SUBJECT MATTER.**

Alexander v. Haley, 460 F. Supp. 40 (SD NY, 1978) in contrary to Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (Sixth Circuit Appendix, pp. 296-307).

c. **DIRECT COPYING.**

Reyher v. Children's Television Workshop, 533 F.2d 87 (2d Cir.), cert. denied, 429 U.S. 980 (1976).

2. **TRADEMARK.**

a. **SIDE-BY-SIDE COMPARISON IS NOT THE TEST.**

Jordache Enterprises, Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482 (10th Cir. 1987); Levi Strauss & Co. v. Blue Bell, Inc., 632 F.2d 817 (9th Cir. 1980); American Home Products Corp. v. Johnson Chemical Co., 589 F.2d 103 (2d Cir. 1978); James Burrough, Ltd. v. Sign of Beefeater, Inc.,

540 F.2d 266 (7th Cir. 1976).

3. FIFTH AMENDMENT.

a. FACT QUESTION.

John W. Shaw Advertising, Inc. v. Ford Motor Company, 112 F. Supp. 121 (D. Ill. 1953).

IV

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL RULEMAKING IN DECIDING IMPORTANT QUESTIONS OF FEDERAL LAW IN THIS CASE, AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION, PURSUANT TO RULE 17, IS REQUIRED

A. A GENUINE ISSUE AS TO A MATERIAL QUESTION OF FACT IS PRESENT, THEREBY MAKING SUMMARY JUDGMENT IMPOSSIBLE IN THIS CASE INVOLVING MIHALEK'S CLAIMS.

In accordance with established law, the Court of Appeals cannot "REMAND" a question of fact on a summary judgment decision, without first "REVERSING" the grant of summary judgment nor can it advance new theories on how the District Court should dispose of a case, pursuant to Rule 56 FRCP. See Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) and Arenas v. U.S., 332

U.S. 419 (1944), as cited by Wright-Miller-Kane, Federal Practice and Procedure, Summary Judgment in General, Section 2716, pp. 650-656.

In this case the Court of Appeals decision, remanding without reversing (Petitioners' Appendix 19a-21a), flies in the face of Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986) and Baxter v. Williams, 812 F.2d 421, 424 (9th Cir. 1987) cert. den., ____ U.S. ____, November 16, 1987, which state:

> ". . .Summary judgment cannot be granted if there exists a genuine dispute as to a material fact. Fed. R. Civ. P. 56(c). Rule 56 calls for the judge to determine whether there exists a genuine issue for trial, not to weigh the evidence himself and determine the truth of the matter. See Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 106 S. Ct. 2505, 2516, 91 L.Ed.2d 202 (1986). The nonmoving party must present evidence sufficient to require a jury or judge to resolve the parties' differing versions of the truth at trial. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289. 88 S. Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). Inferences to be drawn from facts contained in the moving party's papers are to be viewed by the district court in the light most favorable to non-moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Weighing evidence, determining credibility,

> and drawing inferences from facts remain jury functions which may not be undertaken by the trial judge. See Anderson, 106 S.Ct. at 2513. . ..

The Court of Appeals in Mihalek at 821 F2d 327 has established, as a matter of law, that an issue of material fact exists, stating in the Order of June 8, 1987:

> We therefore REMAND the question of alleged photocopying by state officials and whether, if it occurred, this constituted a violation of plaintiffs' claimed rights in any respect in light of the record made by the parties.

The summary judgments in this case must be reversed.

B. THE ELEVENTH AMENDMENT ISSUE MUST BE REACHED.

As already stated in Petitioners' Brief, pp. 26-30, the Eleventh Amendment issue was granted final judgment, as a matter or law, pursuant to Rule 54(b) FRCP, by the District Court and was appealed. The Court of Appeals ignored the 54(b) judgment and failed to reach the liability question even in light of a question of fact. This Court must correct these inequities.

CONCLUSION

The Petition for a Writ of Certiorari should be granted for briefing and oral argument or, in the alternative, a Writ of Mandamus to the Sixth Circuit should issue ordering decision on the Eleventh Amendment. And by Summary Action reverse and remand back to the District Court for trial not inconsistent with Anderson v. Liberty Lobby, Inc., supra, Baxter, supra, Krofft, supra, and Perry v. Sindermann, supra, the summary judgment dispositions raised in the Second and Third Questions presented in the Mihalek Petition.

December 6, 1987

Respectfully submitted,

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